MEDICOLEGAL GRAND ROUNDS

PHYSICIANS' DUTIES TO PATIENTS AND THIRD PARTIES FURTHER DEFINED

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THE TARASOFF DECISION

Most physicians have some knowledge of the case of *Tarasoff v. The Regents of the University of California*.[1] There, an individual, Prosenjit Poddar, become romantically obsessed with the female victim, Tatiana Tarasoff. Poddar related his violent fantasies to his psychotherapist and confided that he might eventually kill her. The psychologist was also aware that Poddar had purchased a gun, and, together with a consulting psychiatrist, they recommended that he be hospitalized for further evaluation.

The campus police were asked to apprehend Poddar for this involuntary evaluation, but following an interview, the police concluded that he was acting rationally. Rather than apprehend him, they made him promise that he would not harm Tarasoff.

Subsequently, he killed Tarasoff and was convicted of second degree homicide. His criminal conviction was later overturned on other grounds. A civil suit was brought by Tarasoff's parents against the University of California alleging, among other things, that the defendant failed to notify them or their daughter that she was in danger. The providers involved claimed they could not warn Tatiana Tarasoff for to do so would violate patient confidentiality. After several appeals, the California Supreme Court agreed with the Tarasoffs, holding that a doctor can owe a duty to warn a third party when that third party is in danger due to the medical or psychological condition of his patient.

According to the court, once a therapist determines, or under professional standards should have determined, "that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."[2]

The Court did not prescribe a specific means of discharging this duty but observed that several alternate means might be utilized, such as warning the intended victim or others likely to inform the victim, as well as notifying the police. In the twenty intervening years since the decision, the identification of the Human Immunodeficiency Virus (HIV) and the increase in numbers of those suffering from the Acquired Immune Deficiency Syndrome (AIDS) have further tested conventional

beliefs regarding patient confidentiality and a physician's duty to warn third parties. Two recent cases deal with the new question of a physician's duty to warn those who are likely to become infected with HIV. Health care providers should become familiar with these duties imposed by recent court decisions and should examine their own practices for ways to discharge such a duty to warn and thereby limit their liability.

1995 CALIFORNIA CASE

The first case, *Reisner v. Regents of the University of California*,[3] dealt with the issue of whether a physician could be liable for the infection of an unknown third party, in this case a boyfriend. In *Reisner*, twelve-year-old Jennifer Lawson received HIV infected blood during an April 1985 surgical procedure. Her physician, Dr. Eric Fonklensrud, and officials at UCLA Medical Center learned of the blood contamination the day after the procedure. At no time during the next five years of continuing treatment did Dr. Fonklensrud or UCLA inform Jennifer or her parents of the blood contaimination. Also, no disclosure was made of the possibility of acquiring AIDS, the dangers of contagion or precautionary measures to prevent the spread of the virus.

Approximately three years later, in 1988, Jennifer met Daniel Reisner and eventually they engaged in sexual relations. In the words of the court, "Obviously, since Jennifer did not know she had been exposed to AIDS, she could not warn Daniel about the risk he was taking."[4] On March 7, 1990, Jennifer was diagnosed with AIDS as a result of the 1985 transfusion. Jennifer and her parents immediately informed Daniel, who was tested for HIV. A month after informing Daniel of her condition, Jennifer died from AIDS. Shortly thereafter, Daniel was informed he was HIV positive. Daniel then sued UCLA and Dr. Fonklensrud for failing to inform Jennifer or her parents and thereby exposing him to an increased risk of infection.

The primary question before the court was what duty, if any, did UCLA and Dr. Fonklensrud have to Daniel, an unknown third party. The Court of Appeals, relying on the California Supreme Court decision in *Tarasoff v. Regents of the University of California*,[5] found they owed a duty to Daniel, even though they may not have known he existed, to take "whatever ... steps are reasonably necessary under the circumstances."[6] In this instance, the court concluded that the physician's failure to warn and counsel Jennifer and/or her parents prevented Jennifer from warning Daniel. He did not have the option of knowingly assuming the risk, taking precautionary measures, or abstaining from sexual relations with Jennifer. The fact that she was still a minor was of little consequence. The court found that Dr. Fonklensrud should have reasonably known that as she matured, the likelihood would grow that she would engage in sexual activity. While not directly stating it, the court's opinion strongly suggests that had the physician informed Jennifer and her parents regarding her HIV infection along with the risk of infection to third parties, his obligation to any third party would have been fulfilled. (The court left open the possibility that if Daniel had infected someone else, that person may have also had a legal basis upon which to file suit against Dr. Fonklensrud and UCLA.)

1996 TEXAS CASE

The other relevant case is a 1996 Texas Court of Appeals decision, *Garcia v. Santa Rosa Health Care Corporation*.[7] There, Adalberto Balderas was a hemophiliac who received blood products from Santa Rosa

in the 1980s. In the mid-1980s, Santa Rosa Health Care Corporation became aware that some of its blood products had been infected with HIV. Accordingly, it was possible that Mr. Balderas was infected. Mr. Balderas had been scheduled for yearly appointments at Santa Rosa--most of which he failed to keep due to conflicts at work. He claimed that he had not been informed of this possible HIV status until after he became ill and tested positive for AIDS in December 1989. He further claimed that had he known of the possibility, he would have sought testing and earlier treatment. He met Linda Garcia in 1987 and married her in March 1988. The couple filed suit in 1991 contending that Santa Rosa was negligent in failing to notify them as to his possible HIV exposure. Linda Garcia, fearful of the result, never had follow-up testing to determine whether or not she was infected with HIV. After filing suit, the couple divorced and Mr. Balderas died in 1993. His estate, represented by his mother, voluntarily dismissed the claims made on his behalf, thereby leaving the court to determine what duty, if any, was owed to Garcia as a third party. The trial court granted summary judgment[8] in favor of Santa Rosa. It determined that there was no duty to notify Garcia of her sexual partner's possible HIV status. The trial court further found that the Texas Communicable Disease Prevention and Control Act[9] prohibited the release or disclosure of test results indicating that a person is HIV positive, and therefore Santa Rosa could not have informed Garcia without facing criminal and civil penalties.

In reversing and sending the case back for trial, the court of appeals noted that Santa Rosa's initial information, which suggested that Balderas may be infected with HIV, was not a result of testing him. It rather was derived from information regarding the condition of their blood bank which placed Balderas at "great risk for developing AIDS."[10] The court then went on to hold that the Communicable Disease Act did not prohibit disclosure of non-test related information which "may be necessary to protect a third party from exposure to AIDS."[11] Noting that Santa Rosa's blood products may have caused the condition, the court, citing *Tarasoff*,[12] concluded "health care professionals who discover some disease or medical condition which their services or products have likely caused to a particular recipient and endanger a readily identifiable third party, owe a duty to reasonably warn the third party to the extent that such warning may be given without violating any duty of confidentiality to the recipient of services or products."[13] The court further noted that while Garcia did not, in fact, know she was infected with HIV, she still may have a valid cause of action for the fear and anguish associated with the exposure to HIV sufficient to collect damages.[14]

CONCLUSION

While HIV infection is considered private, protected information, it is clear that if a health care provider knows the patient is infected or is likely to be infected, then either the patient or those responsible for making their medical decisions must be informed of the infection or likelihood of infection. If not, the liability exposure of the health care provider, like the virus itself, will spread to more and more people. Both courts relied on *Tarasoff*[15] which held, despite the existence of a confidential patient-physician relationship, a provider had a duty to warn a clearly identifiable third party of possible serious harm. This reliance suggests that states may eventually extend provider liability to "significant others" and individuals with whom the provider knows, or has reason to believe, the infected individual is engaged in activity which may spread this virus. This focus by the courts reinforces the need for health care providers to stay current with local reporting requirements and to contact their facilities' attorney any time there is any doubt regarding their legal obligations.

See References on next page.

REFERENCES

1. *Tarasoff v. the Regents of the University of California, et al*, 529 P.2d 553 (Cal. 1974).

2. *Tarasoff v. the Regents of the University of California, et al*, 551 P.2d 334 (Cal. 1976).

3. *Reisner v. Regents of the University of California*, 37 Cal. Rptr 2d 518 (Cal. App. 4th. 1995).

4. *See id* at 519.

5. *Tarasoff* was actually bought before the California Supreme Court on two separate occasions resulting in *Tarasoff I*, found at 529 P.2d 553 (Cal. 1974) and *Tarasoff II*, found at 551 P.2d 334 (Cal. 1976). Typically the opinions of the court are considered singularly.

6. *Reisner v. Regents of the University of California*, 37 Cal. Rptr 2d 520. (Cal. App. 4th. 1995).

7. *Garcia v. Santa Rosa Health Care Corporation*, 925 S.W.2d 372 (Tex. App. 1996, reh'g denied).

8. Summary judgment is granted in favor of a party when, even construing the facts in a light most favorable to the other side, legally the party seeking summary judgment would prevail. When summary judgment is granted on an issue, the issue is not litigated.

9. The act, found at TEX. HEALTH & SAFETY CODE ANN. § 81. 101 (West 1996), et seq., prohibits the release of HIV testing information except in certain circumstances. One exception to the prohibition is found in § 81.103(a)(7) which provides for notification of a spouse. Note that during part of the time period in question, Garcia was not Baldera's spouse.

10. *Garcia v. Santa Rosa Health Care Corporation*, 925 S.W.2d. 376 (Tex. App. 1996, reh'g denied).

11. *See id.*

12. *See supra* note 5.

13. *Garcia v. Santa Rosa Health Care Corporation*, 925 S.W.2d 376 (Tex. App. 1996, reh'g denied).

14. The court cited the case of *Casarez v. NME Hospital, Inc.*, 883 S.W.2d 360 (Tex. App. 1994, writ dism'd by agr.) for the proposition that fear and anguish due to exposure may be sufficient to recover damages. *Casarez*, however, deals with actual HIV infection.

15. For more information on *Tarasoff*, see *Legal Duties Involving Physicians, Patients and Third Parties*, by Colonel David T. Armitage, M.D., J.D., Part One, Legal Medicine Open File 94-2, pg 7, and Part Two, Legal Medicine Open File 95, pg 25.